

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Mrs Lisa Thompson
Represented by: Mr Andy Castle

RESPONDENT: On the Rocks Limited) (T/A Beaucette Marina Restaurant)

Mr William Dodd, for Respondent, advised the Tribunal prior to the Hearing in writing, that the Respondent would not attend the Hearing. In this communication the Respondent requested that the Tribunal take into account documentation submitted in support of the Respondent's ET2 response form.

Included in the documentation from the Respondent were witness statements from:

- Mr William Dodd, on behalf of the Respondent
- "AB" Office Manager Beaucette Marina
- "DM" Yard Hand Beaucette Marina
- "CS" Yard Hand Beaucette Marina
- "JT" Easy-Clean employee

Applicant's Witnesses:

- Mr Thompson gave oral and written evidence
- "CB" a Kitchen Assistant gave oral and written evidence

Evidence was provided by witness statement only from:

- "GDL" a Chef
- "JH" a Kitchen Porter
- "DS" the Applicant's previous employer
- "JE" a Kitchen Assistant

Decision of the Tribunal Hearing held on 8 November 2012

Tribunal Members: Mr Peter Woodward (Chairman)
Ms Georgette Scott
Ms Caroline Latham

DECISION

Having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, the Tribunal determined that the principal reason for the Applicant's dismissal was her marital status and that under section 9A of the

Employment Protection (Guernsey) Law, 1998, as amended the Applicant was unfairly dismissed.

The Tribunal awards £17,425.65, this being the equivalent of six months' pay, as determined by the Tribunal.

The Tribunal makes a further award under the Employment Protection (Recoverable Costs) Order 2006, of £337.16; these being the costs necessarily incurred by the Applicant in attending the Tribunal Hearing.

Mr Peter Woodward

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Signature of the Chairman

28 November 2012

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Date

The Laws referred to in this document are The Employment Protection (Guernsey) Law, 1998, as amended and The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005

Extended Reasons

1.0 Introduction

1.1 The Applicant, Mrs Lisa Thompson, was represented by Mr Andy Castle.

- Mrs Thompson gave oral and written evidence
- “CB” a Kitchen Assistant gave oral and written evidence

Witness statements were also given by:

- “GDL” a Chef
- “JH” a Kitchen Porter
- “DS” the Applicant’s previous employer
- “JE” a Kitchen Assistant

1.2 Mr William Dodd, the designated representative for the Respondent, On the Rocks Limited (T/A Beaucette Marina Restaurant), did not attend the Hearing. It is noted that Mr Dodd had written to the Secretary to the Tribunal on 19 October 2012 stating that the Respondent would no longer be appearing at the Hearing to defend the claim, as a result of the Company’s insolvency. The Respondent requested the Tribunal should review the documentation that had already been provided and in his words “reach a fair decision in relation to the claim”.

In respect of this request the Tribunal has taken into account documentation submitted in support of the Respondent’s ET2 Response form on 15 May 2012 and 20 June 2012. Included in this documentation were witness statements from:

- Mr William Dodd, on behalf of the Respondent
- “AB” Office Manager Beaucette Marina
- “DM” Yard Hand Beaucette Marina
- “CS” Yard Hand Beaucette Marina
- “JT” Easy-Clean employee

1.3 Documentation was provided by the Applicant

EE1 Primary Bundle

EE2 Payroll Record

EE3 designated as “Failure to Provide Written Particulars”

EE4 Submission on Unfair Dismissal and Marital Status

EE5 Closing Statement

In addition to his ET2, the Respondent had submitted a bundle (ER1 Refers) prior to consideration of the preliminary issue. The Tribunal has seen fit to rely on several documents in this bundle in consideration of the substantive issue i.e. the complaint of alleged unfair dismissal.

- 1.4 This Judgement should be read in conjunction with a Judgement on a preliminary issue dated (23 November 2012) in which the Tribunal found that the Applicant had been in continuous employment with the Respondent for a period sufficient to entitle her to bring a complaint of alleged unfair dismissal as defined in the Employment Protection (Guernsey) Law, 1998, as amended. The period of employment commenced on 1 October 2010 and the Effective Date of the Termination of that employment (EDT) was 29 April 2012.
- 1.5 The Applicant claimed she was unfairly dismissed on 29 April 2012. It was her belief that her marital status was a reason or the primary reason for her dismissal and consequently she had been subjected to direct discrimination.
- 1.6 At the outset of the hearing it was confirmed that the Applicant received a monthly gross salary £2,904.26 (EE2 Refers) in the six month period prior to the EDT. However, the Applicant also claimed that a verbal agreement with the Respondent had included several additional elements:
- A Bonus based upon the gross profit of the “food side of the business”
 - Four Weeks holiday
 - A three month notice period

The Applicant requested that, in the event of the complaint being upheld, the Tribunal should give consideration to an award which took account of some or all of these elements, under the provisions of section 22(2)(b) of the Law.

2.0 Facts Found

- 2.1 The Applicant and her husband were introduced to Mr Stephen Haines, the founder and an owner of “On the Rocks”, via a prior employer of the Applicant. It was the intent of the Respondent to establish a restaurant at Beaucette Marina and he chose the Applicant and her husband to become part of this project. An email written on behalf of Mr Haines by WG, his PA, dated 3 June 2010 (Tab 10 ER1 Refers) stated that Mr Haines wished to “reconfirm his verbal offer of employment” to both of them and that it was his intention to match the Applicant’s current salary package in Sark.

The email contained the following statement:

“Steve has asked me to write to reconfirm his verbal offer to you both to work as the permanent and full time Chef and Front of House at the Marina Restaurant with your salary to be matched to your current salaries. In addition a profit share scheme will be implemented and this and other package details can be discussed in more detail once you are in Guernsey”.

The Applicant did not resign from her previous post until she had this assurance (EE2 Page 2 Refers); an email dated 30 May 2010 from Lisa and Gary Thompson to Stephen Haines had stated:

“We look forward to receiving something in writing as soon as possible then we can proceed with our resignation and plan our move to Guernsey”

Further to these communications an email dated 30 September 2010 set out the Applicant's understanding of the oral contract between herself and the Respondent (ER1 Tab 11 Refers).

- 2.2 The Applicant was not issued with a contract of employment at any time in the period 3 June 2010 to 29 April 2012.
- 2.3 Work was undertaken by Mrs Thompson on behalf of the Respondent from the 1 October 2010; defining the future restaurant business, obtaining equipment and prospecting for staff.
- 2.4 Salary payment was made personally each month by Stephen Haines in the period October 2010 to April 2011; and then via a payroll mechanism from May 2011 onwards.
- 2.5 In her role as Front of House Manager, the Applicant was in charge of the restaurant but not the kitchen, which was under the control of Mr Gary Thompson.
- 2.6 On 27 March 2012, an alleged assault took place between the Applicant's husband and "Mr RS", Manager of Beaucette Marina and also an employee of Mr Stephen Haines. Her husband asked the Respondent to intervene to manage the issue of the alleged assault and to ensure there would not be a repetition, but found support from the Respondent wanting.
- 2.7 Mr Thompson consulted his doctor on 3 April 2012 and was signed off for a week following a stress related diagnosis. He was subsequently signed off, with the same diagnosis, for two weeks from 10 April 2012, and again for a month from 23 April 2012.
- 2.8 On 29 April 2012 the Applicant was on duty at the Restaurant and was given a letter by Mr Stephen Haines. The letter read as follows:

"Dear Mrs Thompson

I am writing to confirm that as of today's date your employment as Front of House Manager with Beaucette Marina Restaurant is terminated"

This letter being signed by Stephen Haines.

- 2.9 On the same date the Applicant was given a letter by Mr Haines to pass to her husband. This letter confirmed that her husband was dismissed on the same date as the Applicant.

3.0 The Law

- 3.1 The Applicant claimed that she had been unfairly dismissed within the meaning of paragraph 9A of the Employment Protection (Guernsey) Law, 1998 as amended; i.e. *"the dismissal of an employee by an employer shall be regarded for the purposes of this part of the law as having been unfair if the dismissal constituted an act of discrimination against the employee prohibited by any provision of Part II of the Sex Discrimination (Employment)(Guernsey) Ordinance, 2005"*.

- 3.2 Part II of the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 section 6 (2)(b) which states “....a person shall not, in the case of a woman employed by him at an establishment in Guernsey, discriminate against her by dismissing her, or subjecting her to any other detriment”.
- 3.3 In the event that this complaint would be upheld then paragraph 23(4) of the Employment Protection (Guernsey) Law, 1998 as amended sets aside the provision for Tribunal to consider a possible reduction of award.
- 3.4 Whilst not legally binding the Tribunal took account of the Commerce and Employment Code of Practice “Disciplinary Practice and Procedures in Employment”.

4.0 Respondent’s Submission

- 4.1 The Respondent submitted an ET2 on the 15 May 2012, alleging that the Restaurant dismissed the Applicant for two reasons:
- Whilst the Applicant’s husband was on sick leave the Respondent had inspected the kitchen and found it “alarmingly filthy” and well below food hygiene and health and safety standards. The Respondent had found it necessary to engage a specialist firm of cleaners to undertake a deep clean. They held the Applicant and her husband jointly responsible for the state of the kitchen
 - Given her senior role the Respondent held that the Applicant should have advised them of the deficiencies in the kitchen
- 4.2 The Respondent subsequently provided further particulars on 20 June 2012. In this document he alleged a number of reasons for the Applicant’s dismissal (EE1 Pages 31 & 32 Refer):
- The state of the kitchen was in breach of prevailing Food Hygiene and Health and Safety Standards and the Respondent held the Applicant jointly responsible with her husband for this alleged breach of regulations
 - Gross misrepresentation of her expertise, experience and standards of quality when she commenced employment with the Respondent
 - That the Applicant lacked business sense and was unable to make credible revenue forecasts. Also, the Applicant had to be stopped on a number of occasions from closing the restaurant to the public in favour of private events which were clearly uneconomical

The Respondent also held in this submission that to consider Mr and Mrs Thompson as individual employees was, in his words, “nonsense”. He argued that they had offered themselves as a partnership, came to work for a joint salary package and were responsible for both ends of the complete business. He held that one could not work without the other.

5.0 "CS" Yard Hand Beaucette Marina - by witness statement only

5.1 The witness' sister had requested the Applicant's husband to clear up some cigarette papers which he had allegedly dropped near the restaurant. The Applicant's husband was reportedly upset and allegedly made a rude response about "CS".

5.2 "CS" subsequently reported this altercation to his manager," RS".

6.0 "DM" Yard Hand Beaucette Marina - by witness statement only

6.1 The witness recalled "CS" asking his sister to talk to the Applicant's husband about the cigarette papers.

7.0 "AB" Office Manager Beaucette Marina - by witness statement only

7.1 The witness stated that "RS", the Marina Manager, was upset over the Applicant's husband allegedly making rude remarks to the sister of "CS". "Mr RS" informed the Applicant that he had tried to confront her husband on the issue but Mr Thompson reportedly did not want to discuss the issue and had turned his back on "Mr RS".

8.0 "JT" Easy-Clean employee - by witness statement only

8.1 The witness confirmed that her organisation had been approached by the Respondent on 30 April 2012 to inspect the kitchen and recommend any necessary action. The witness found the kitchen in need of a thorough "deep clean" which was conducted the following day by a team of eight cleaners. In a subsequent letter "JT" stated that in her opinion the kitchen was dirty and not up to standard; further that it was her opinion the kitchen equipment had not been properly cleaned since its installation April 2011.

9.0 Mrs Lisa Thompson, the Applicant - Oral Evidence & Witness Statement

9.1 The Applicant read from a witness statement (EE1 Pages 13 & 14 Refer).

9.2 On 27 March 2012, "Mr RS", the manager of the Beaucette Marina, came to the kitchen and allegedly assaulted her husband.

9.3 Following this confrontation, the Applicant's husband emailed both Mr Haines and Mr Dodd in the hope they would intervene and resolve the problem; however the response from the two directors was to place equal blame on both her husband and "Mr RS", and advised Mr Thompson he should resolve his differences personally with "Mr RS".

9.4 The Applicant's husband emailed the two directors again telling them he was genuinely fearful but obtained no response. In a state of agitation and stress he consulted his doctor and was signed off for reasons of stress related sickness.

9.5 The Applicant's husband met with the two directors twice, on 4 April and 17 April 2012. The directors continued to advise him to resolve the problem personally with "Mr RS". They made no attempt to formally investigate his complaint or interview any of the witnesses to the incident.

- 9.6 The Applicant was approached by Mr Haines on a number of occasions, prior to 23 April 2012, to ask about her husband. Each time the Applicant told Mr Haines that this was an issue he needed to take up directly with her husband.
- 9.7 On 23 April 2012, Mr Haines approached the Applicant whilst she was working at the restaurant and addressed her in an aggressive manner over her husband's indisposition and used, in her words, "bad language". The Applicant told Mr Haines yet again that he needed to talk directly with her husband.
- 9.8 On the evening of 29 April 2012, Mr Haines came into the restaurant as it was closing. He told the Applicant that it was in the best interests of the business for him to let her husband go. He informed the Applicant that he had found a replacement for both the Applicant and her husband. He gave her a letter of dismissal (EE1 Page 10 Refers) and additionally a letter of dismissal for her husband. The Applicant was asked to hand over the keys to the restaurant and the Respondent told the Applicant to leave the premises immediately.
- 9.9 The Applicant strongly denied the alleged gross misrepresentation of her expertise, experience and standards of quality by the Respondent. She referred the Tribunal to her CV (EE1 Pages 37 and 38 Refer) and her of relevant experience prior to beginning her employment with the Respondent. In addition the Applicant requested the Tribunal to consider a reference from her previous employer in Sark (EE1 Page 20 Refers). This reference paid tribute to the high levels of customer satisfaction when the Applicant and her husband ran his restaurant.
- 9.10 The Applicant stated that if the Respondent had real concerns as to her performance prior to her dismissal no such issues were ever raised during her period of employment.
- 9.11 Mrs Thompson stated that she had no doubt that she was dismissed because the Respondent wanted to get rid of her husband and that, as far as he was concerned, she and her husband were viewed as a "package". It was her view that she was sacked for no other reason than she was married to Mr Gary Thompson.

10.0 "CB" Kitchen Assistant - Oral Evidence & Witness Statement

- 10.1 The witness read from a witness statement (EE1 Page 18 Refers).
- 10.2 The witness, who was employed from April 2011, was responsible for cleaning the kitchen, with some items being scheduled by the Applicant's husband for a daily clean and others on a weekly schedule. She had qualifications in kitchen hygiene. She stated that the kitchen was maintained to very high standards of cleanliness; and in her opinion would never have breached hygiene rules.

11.0 "GDL" Chef - Witness Statement Only

- 11.1 The Applicant submitted a witness statement in the bundle (EE1 Page 15, 16 & 17 Refer).

- 11.2 On 27 March 2012 the witness observed the Applicant's husband leave the kitchen with "Mr RS" and then heard some shouting. He then observed the Applicant's husband making a hasty return to the kitchen closely followed by "Mr RS". "Mr RS" was apparently trying to grab the Applicant's arm. "Mr RS" tone was aggressive and in the words of the witness statement "scary".
- 11.3 In his statement the witness asserted that the standard of hygiene in the kitchen, whilst under the control of the Applicant's husband, was above average.

12.0 Closing Statement: Mr Andy Castle

- 12.1 Mr Castle argued that the grounds for dismissal relied upon by the Respondent in its submission were totally without merit and there must be another reason for the dismissal. Mr Castle reminded the Tribunal that the Respondent had at no time put any of these allegations to the Applicant during the period of her employment. He questioned why, if the Respondent had had genuine concerns, these issues weren't raised with the Applicant prior to dismissing her.

- 12.2 Mr Castle then turned to the issue of the verbal agreement between the Applicant and the Respondent in respect of:

- A Bonus based upon the gross profit of the "food side of the business"
- Four Weeks holiday
- A three month notice period

None of these provisions were honoured. Mr Castle stated that the Tribunal should decide whether they accepted the Applicant's evidence that such provisions were included in the oral contract; if they did then they should consider if any potential award should take into account any of the provisions.

- 12.3 Mr Castle also drew the attention of the Tribunal to the clear and uncontested breach of the "Conditions of Employment (Guernsey) Law 1985. In summary the law requires:

- That no later than four weeks after the beginning of the employment that a written statement should be provided
- This written statement should identify the parties and specify the date of commencement of employment
- Certain particulars relating to the scale of remuneration, pay periods, normal working hours, holiday entitlements and other employment related benefits must be specified
- Length of notice and job title must be specified

None of these particulars were provided to the Applicant in written form whilst in employment with the Respondent.

- 12.4 Mr Castle made an application for costs under the Employment Protection (Recoverable Costs) Order 2006. The Applicant is now resident in the UK following her dismissal and necessarily had to incur certain travel and accommodation costs to attend the hearing. Copies of relevant invoices were presented to the Tribunal.

These were:

- Cost of return flight Exeter-Guernsey-Exeter, £249.66
- Two night's accommodation in Guernsey, £87.50

13.0 Conclusions

13.1 The Respondent alleged in his ET2 and subsequent written submissions that the dismissal was based on the following grounds:

- The state of the kitchen was in breach of prevailing Food Hygiene and Health and Safety Standards; and the Respondent held the Applicant jointly responsible with her husband for this alleged breach of regulations. Also given her senior role the Respondent held that she should have advised them of the deficiencies in the kitchen
- Gross misrepresentation of her expertise, experience and standards of quality when she commenced employment with the Respondent
- That the Applicant lacked business sense and was unable to make credible revenue forecasts. Also the Applicant had to be stopped on a number of occasions from closing the restaurant to the public in favour of private events which were clearly uneconomical

13.2 The Tribunal has considered each of these allegations as set out in the following paragraphs.

13.3 The Tribunal has concluded from all the available evidence that the role of Front of House Manager was very different in nature from that of Chef. No evidence was offered by the Respondent that could persuade the Tribunal that the Applicant had any informal or formal responsibility for the kitchen.

13.4 Even if the Tribunal accepted, which it does not, that the Applicant might have had any joint responsibility for the kitchen they heard credible evidence from the Applicant, a chef and a kitchen assistant that above average standards of hygiene were consistently maintained.

13.5 The allusion of gross misrepresentation in relation to the Applicant's career to date and experience would seem groundless. The combination of a detailed CV and a reference by a prior employer are preferred to the Respondent's assertions.

13.6 The Applicant denied that she had made poor decisions when favouring private restaurant events over public openings and the Tribunal found her testimony on this issue to be credible.

13.7 The Respondent did not offer any factual evidence as to the Applicant's lack of business "know how" in making revenue forecasts.

13.8 The Tribunal gave consideration to the witness statements of "AB", "DM", "CS" and "JT"; these being submitted by the Respondent as part of a joint rebuttal of the complaints of unfair dismissal brought by the Applicant and her husband. It seemed

to the Tribunal that these statements had only very limited relevance to the complaint brought by Mrs Thompson.

- 13.9 The Tribunal concludes that on the balance of probabilities none of the above was the primary reason for the dismissal. Whereas the Tribunal puts significant weight on the Respondent's submission that Mr and Mrs Thompson had offered themselves as a partnership, came to work for a joint salary package and were responsible for both ends of the complete business. The Respondent held that it was "a nonsense" to consider Mr and Mrs Thompson as separate employees.
- 13.10 This view of employment is not consistent with the underlying reality that each employee in a Guernsey establishment has a separate employment contract under the Law. It follows that each employment contract must be dealt with individually.
- 13.11 It would also seem to the Tribunal that the procedure used by the Respondent to dismiss the Applicant was an egregious breach of Commerce and Employment Code of Practice "Disciplinary Practice and Procedures in Employment". In particular the following:
- No prior warnings of management concerns over possible performance deficiencies
 - No prior and impartial investigation of the alleged deficiencies in work performance
 - No notification prior to the dismissal that a disciplinary action would be taken
 - No opportunity for a meeting with the Respondent prior to the dismissal
 - Dismissal via a letter handed to the Applicant
 - No right to appeal the decision
- 13.12 The Tribunal is conscious that the Respondent is not a large company; however, judged by even the minimum standards of good practice it would seem that no reasonable employer could imagine their actions in this matter were a reasonable response within a reasonable range of responses.
- 13.13 On the balance of probabilities however, the Tribunal has concluded that the principal reason for this dismissal was the Applicant's marital status and as such deemed the Applicant's dismissal to be an act of direct discrimination as described in section 4(1)(a) of the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 and that the Respondent was therefore in contravention of section 6(2)(b) of the Sex Discrimination Law; the ultimate detriment being suffered being that of dismissal.
- 13.14 No clear written documentation existed that clearly delineated the terms of the contract which existed between the two parties; this complicated and lengthened the Tribunal's deliberations in reaching its preliminary decision (dated 23 November 2012), that the Applicant was an employee of the Respondent. The Tribunal notes that no written statement of the main terms and conditions of employment under the Conditions of Employment (Guernsey) Law, 1985, were ever issued – however, the Tribunal has no jurisdiction in that Law, any such issues should be raised with the Commerce and Employment Department.

- 13.15 In relation to the calculation of an award the Tribunal was requested that it should give consideration to the inclusion of some or all these elements under the provision of section 22(2)(b) of the law which states:

“in a case where in the opinion of the Tribunal the basis set out in paragraph 22(2)(a) for calculating the amount of a month’s pay or (as the case may be) a week’s pay is inappropriate, shall be calculated on such other basis as the Tribunal may consider to be just and equitable”

The elements considered were:

- A Bonus based upon the gross profit of the “food side of the business”
- Four Weeks holiday
- A three month notice period

The Tribunal decided that there was insufficient information to determine what the bonus element might have been, if paid, and therefore it cannot be considered as part of the six months’ pay in the period up to the EDT. The notice period and holiday pay constitute contractual items over which the Tribunal has no jurisdiction.

14.0 Decision

- 14.1 Having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, the Tribunal determined that the principal reason for the Applicant’s dismissal was her marital status and that under section 9A of the Employment Protection (Guernsey) Law, 1998, as amended the Applicant was unfairly dismissed.
- 14.2 The Tribunal awards £17,425.65, this being the equivalent of six months’ pay, as determined by the Tribunal.
- 14.3 The Tribunal makes a further award under the Employment Protection (Recoverable Costs) Order 2006, of £337.16. These being the costs necessarily incurred by the Applicant in attending the Tribunal Hearing.

Mr Peter Woodward

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Signature of the Chairman

28 November 2012

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Date